No. 141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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THE ARGUS PRESS, SEATTLE

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vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor, *Respondents*.

No.....

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of Harvey Eastman, Charles Strom, Oscar McLeod, Alfred Edward Becken, Layton Henry Williams, James Jackson, *et al.*, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioners are Quinaielt Indians, owning trust allotted lands in the Quinaielt Indian Reservation in the State of Washington. The petitioners brought ~~in the sale and logging of the timber on their allotted~~ this suit, as allottees of lands, on behalf of themselves and all other allottees similarly situated.

The petitioners, in their complaint (R. 83) in the

District Court, sought a declaration that the Indians have authority to dispose of the timber on their allotments, and that regulations of the Secretary of the Interior, made in 1920 and 1936, which sought to regulate the sales of timber on Indian lands, are illegal and void. Petitioners prayed an injunction restraining interference by the defendants with the Indians lands in the Quinaielt Indian Reservation.

The District Court denied the defendants' motion to dismiss (R. 77; 28 F. Supp. 807), and later decided the cause on the merits in favor of the complainant Indians, holding the regulations sought to be enforced by the defendants invalid, and that the petitioners were suffering substantial and immediate detriment and irreparable injury in that enforcement of the regulations deprived the allottees of the right conferred by Congress to sell their timber, and illegally withheld as much as 25% to 60% of their timber from sale (R. 159, 178) for scenic, aesthetic, recreational, roadside beautifying, seeding, second cutting, and similar purposes (R. 169-171, 175). The trial court therefore enjoined the enforcement of these regulations and any interference with the logging operations that the Indians might desire to have carried on under sales contracts entered into by them (R. 150, 185; 31 F. Supp. 754).

The foregoing decision of the trial court was reversed by the Circuit Court of Appeals for the Ninth Circuit (R. 1040; 118 F. (2d) 421). This decision of the Circuit Court of Appeals the Indian petitioners earnestly seek to review here upon the following questions:

in the sale and logging of the timber on their allotted

Questions Presented

1. In the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971), and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. §71), providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of the Fifth Amendment providing for due process of law and that private property shall not be taken for a public use without just compensation, and of Sections 7 and 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §§ 407 and 406), providing for the sale of timber on unallotted lands "under regulations to be prescribed by the Secretary of the Interior," and providing that timber on allotted lands may be sold *by the Indian allottee* "with the consent of the Secretary of Interior," who is given power to make regulations governing the payment of the proceeds to the allottee, does the Secretary of the Interior have the power, in connection with and after giving his consent to the sale of timber, by members of the Quinaielt Indian Tribe, on *allotted lands*, to impose a system of regulations (R. 400, 359, 175-6) concerning the manner and places of logging the timber and the amount of timber to be sold?

2. In the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971), which provides that "roads may be run through said Reservation, on compensation being made for any damage sustained thereby," and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. §71), providing that no Indian treaty made prior to 1871 shall be invalidated

or impaired, and of the Fifth Amendment providing for due process of law and that private property shall not be taken for a public use without just compensation, and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §406), authorizing the Secretary of the Interior to "consent" to a sale by the Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, does the Secretary of the Interior have the power to impose, on the logging of Indian timber on allotted lands in the Quinaielt Reservation, Section 10 of the General Forest Regulations of 1920 (R. 403), providing for the reservation, for scenic, aesthetic, and recreational reasons, of a strip of land on each side of roads, trails and streams, as amended by Regulation 22 of the General Forest Regulations of 1936 (R. 380, 381), reserving a quarter of a mile of timber on each side of the road, which in an amendment to the 1936 Regulations was fixed at two hundred feet on each side of the highway (R. 176), thus in effect enlarging and widening the extensive roads through the Reservation and dedicating timber lands along roads, trails and streams, to public use for scenic and recreational purposes and confiscating them for such purposes, without providing for compensation?

3. In the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971) which provides in Article 10 that

> "the United States further agrees * * * the expenses * * * of employes * * to be defrayed by

> the United States, and not deducted from their annuities,"

and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. §71), providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25U.S.C. §406), authorizing the Secretary of the Interior to "consent" to a sale by an Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, and of the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. §413), authorizing the Secretary with respect to the sale of timber on allotted Indian lands to make "regulations" charging "a reasonable fee for the work incident to the *sale*," does the Secretary of the Interior have the power to impose upon logging operations of allotted Indian lands in the Quinaielt Reservation, Regulation 50 of the General Forest Regulations of 1920 (R. 413, 414), charging the Indians an amount of 10% from the gross proceeds of sale, to cover the Government's expenses, through the Indian Agency, of examining, advertising, marking, scaling and protecting the timber, and supervising the sale, as amplified by Regulation Number 19 of the General Forest Regulations of 1936 (R. 376), fixing the amount of compensation to the Government, for said purposes, at 8% of the gross amount received for the timber sold under regular supervision (R. 377)?

These are the sole questions presented in this petition for certiorari.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals conflicts with *United States v. Algoma Lumber Company*, 305 U. S. 415, wherein it is held that timber sales on allotted lands are contracts between the Indian allottees and the purchasers, to which the Government is not a party. "The contracts authorized were to be those of the Indians and not of the United States" (305 U.S. 415, 422, 423). Hence it follows that the Secretary could not add regulations to the contract at the time of giving his consent, or thereafter (as in the case of the 1936 regulations). He was not a party to the contract, but is merely given supervisory power. He could give his consent, or he could refuse to consent to the contract between the actually contracting parties. His consent or refusal had to be absolute. A consent circumscribed with a system of regulations could not adversely affect the contracts. Unless the two actually contracting parties, namely, the Indian allottee and the purchaser, accepted the regulations, the Secretary could not lawfully impose them. The Indians have not legally consented. If he gave his consent to the sale, which was the extent of his authority under the statute (Section 8 of the Act of June 25, 1910, 36 Stat. 855, 857, 25 U.S.C. §406), the consent was effective, but the regulations sought to be added were nugatory.

The decision of the Circuit Court of Appeals also conflicts with *United States v. Shoshone Tribe*, 304 U.S. 111, 116-117, holding that the Indians are the

substantial owners of reservation lands, and not the United States, and with *Chippewa Indians v. United States*, 301 U.S. 358, 375-6, holding the power of the government to manage Indian lands "is subject to constitutional limitations and does not enable the government * * * to deal with them as its own." While the government as to its own lands can dedicate to public use for scenic and recreational purposes large timber lands along roads, trails, and streams, it is submitted that it cannot do so as to Indian lands without providing for just compensation.

2. The Circuit Court of Appeals for the Ninth Circuit has decided important questions of federal law which have not been but should be settled by this Court. The decision affects many thousands of Indians holding allotted timber lands in large areas of the United States. The decision affects millions of dollars worth of timber and the power of sale of the Indians with respect thereto expressly conferred by Congress.

The Quinaielt Treaty of 1855 (12 Stat. 971) in Article VI authorized the President to assign lots to individuals or families "on the same terms and subject to the same regulations as are provided in the Sixth Article of the treaty with the Omahas so far as it may be applicable." The Sixth Article of the Treaty with the Omahas (10 Stat. 1043, 1044) authorized the President to make allotments for *permanent homes*, and, *in such case only*, may impose the condition that the land shall not be aliened. But "these [Quinaielt] Indians are not the usual reservation Indians. They were never placed on the reservation *or required to*

live within its limits." *Halbert v. United States*, 283 U.S. 753, 761. Only a very few of the many allottees actually live on the reservation, and their lands and the timber thereon are, therefore, not subject to restraints on alienation, so far as the treaty is concerned, and they own their lands and the timber thereon with ordinary powers of disposition, free of restraints as far as 25 U.S.C. § 406 is concerned, and hence free of consent or regulations.

In any event, the effect of the decision of the Circuit Court of Appeals is in substance to deny to these Indians a power to sell timber, which includes the power to fix the terms and conditions of sale, expressly conferred on them by Congress; the Circuit Court decision grants to the Secretary of the Interior powers to make regulations not conferred, and not intended to be conferred, by Congress.

The Circuit Court of Appeals expressly holds that the words in Section 406 (Section 8 of the Act of June 25, 1910; 36 Stat. 855, 857, 25 U.S.C. 406) as follows:

> "The timber on any Indian allotment, held under a trust or other patent containing restrictions of alienation, may be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit *under regulations* to be prescribed by the Secretary of the Interior." (Italics ours)

notwithstanding the careful choice of words by Congress, differentiating between "regulations" and "consent," mean the same as the words in the adjoining

Section 407 (Section 7 of the same act; 25 U.S.C. 407) as follows:

> "The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold *under regulations* to be prescribed by the Secretary of the Interior * * *" (Italics ours)

Congress clearly intended that timber on unallotted lands of any Indian reservation might be sold under regulations to be prescribed by the Secretary of the Interior; but that timber on any Indian allotment may be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof paid to the allottee *under regulations* to be prescribed by the Secretary of the Interior. Rather startlingly the Circuit Court says (R. 1046; 118 F. (2d) 421, 424): "We think it is without significance that Section 7 authorizes regulations governing the sale whereas Section 8 speaks of consent," thus denying the plain meaning of the words used by Congress in successive sections of the same statute.

As to timber on allotted lands it was clearly the intent of Congress that it could be sold *by the allottee*, on such terms as the allottee might prescribe, but that the sale on the terms and conditions fixed by the allottee, would have to be submitted for the consent or rejection of the Secretary.

Congress intended that as to timber on allotted lands the allottee should have the full power to sell and specify the terms of sale, and that the Secretary should have the power of consent or refusal, but it did not give him the power to give his consent and

at the same time, or thereafter, make regulations concerning the sale, as in the case of unallotted lands.

Prior to the Act of June 25, 1910 (36 Stat. 855, 857, 25 U.S.C. §§ 407, 406) the sale of an Indian allotment was governed by the Act of March 1, 1907 (34 Stat. 1018; 25 U.S.C. § 405) and had to be "on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe." The Act of June 25, 1910 (36 Stat. 855) was an elaborate act relating to Indians and was intended to enlarge their rights (See *Eastman v. U. S.*, 31 F. Supp. 754, 760-1). It for the first time dealt specifically with the sale of *timber* on allotted and unallotted Indian lands. With respect to timber on unallotted Indian lands the act provided (36 Stat. 857, 25 U.S.C. 407) that it might be sold "under *regulations* to be prescribed by the Secretary of the Interior." With respect to timber on allotted lands the act provided that such timber "may be sold by the *allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under *regulations* to be prescribed by the Secretary of the Interior" (Italics ours). The Circuit Court of Appeals says that all this means the same thing; that "consent" means "regulations," and that "regulations" means "consent," although Congress used the words in adjoining sections carefully and advisedly in their ordinary meaning. This, we respectfully submit, is an egregious error, adversely affecting vast numbers of Indians and large areas of Indian lands, and warrants correction by this Court.

Moreover, as to the regulation setting aside, for aesthetic and recreational purposes, 200 feet of timber on each side of roads, trails, and streams, for many miles in the Reservation, the Secretary, in substance and in fact, has enlarged and widened the extensive road areas throughout the Quinaielt Reservation, without providing compensation therefor, in what seems a manifest violation of the Quinaielt Treaty of 1855 and of the Fifth Amendment, a result that Congress clearly never intended or authorized, and which amounts to a taking of Indian property. *U. S. v. Klamath Indians*, 304 U.S. 119, 123; *Chippewa Indians v. U. S.*, 301 U.S. 358, 375-6; *Portmouth Co. v. U. S.*, 260 U.S. 327 (where government acts were held to amount to a taking).

Again as to the regulation charging the Indian allottee 8% of the gross proceeds of the sale of the timber, the Quinaielt Treaty seems clearly to contemplate that the Government will bear the entire expense of Government employees and therefore the Act of February 14, 1920 (41 Stat. 415, 25 U.S.C. § 413) should, under settled rules of construction be applied only to situations where there is no applicable treaty provision, which Congress has clearly indicated its intention not to violate.

3. The decision of the Circuit Court of Appeals involves the treaty rights and statutory rights of Indians, which this Court has constantly said should be liberally construed (*U. S. v. Payne*, 264 U.S. 446, 448-9, and cases cited) and as to treaty rights particularly, should be construed with "enlarged rules of construction" and "in the sense in which they would naturally

be understood by the Indians," all doubts being resolved in their favor. *Jones v. Meehan*, 175 U.S. 1, 11; *Choate v. Trapp*, 224 U.S. 665, 675; *U. S. v. Shoshone Tribe*, 304 U.S. 111, 116.

This cause relates to the valuable rights of Indians, who are wards of the Government. This Court, recognizing the peculiar position of the Indian in this country, has been most solicitous that his rights be not denied except upon the judgment of the highest court in the land. Consequently this Court has often and recently granted certiorari in cases affecting the rights of Indians, *e.g.*:

Klamath & Modoc Tribes v. U. S., 296 U.S. 244;
Cate v. Beasley, 299 U.S. 30;
British American Oil Co. v. Board, 299 U.S. 159;
Shoshone Tribe v. U. S., 299 U.S. 476;
U. S. v. Seminole Nation, 299 U.S. 417;
U. S. v. McGowan, 302 U.S. 535;
Creek Nation v. U. S., 302 U.S. 620;
U. S. v. Shoshone Tribe, 304 U.S. 111;
Minnesota v. U. S., 305 U.S. 382;
U. S. v. Algoma Lumber Co., 305 U.S. 415;
U. S. v. Powers, 305 U.S. 527;
U. S. v. United States Fidelity & G. Co., 309 U.S. 506.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled in its Docket No. 9558, *United States of America, et al., Appellants, v. Harvey Eastman, et al., Appellees*; and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Signed:

HARVEY EASTMAN
CHARLES STROM
OSCAR MCLEOD
ALFRED EDWARD BECKEN
LAYTON HENRY WILLIAMS
JAMES JACKSON, *et al.*,

By W. A. ACKERMAN,
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No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in this cause is reported in 118 F. (2d) 421 (R. 1040).

II.

JURISDICTION

1. The date of the decree to be reviewed is March 10, 1941 (R. 1050).

2. The specific claims advanced and rulings made in the lower court which are relied on as a basis of this Court's jurisdiction are:

(a) Petitioners claimed that in the light of the

Quinaielt Treaty of 1855 (12 Stat. 971) and of the Fifth Amendment and of Sections 7 and 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §§ 407 and 406) the Secretary of the Interior had no power, in connection with and after giving his consent to the sale of timber by members of the Quinaielt Indian Tribe on allotted lands, to impose a system of regulations concerning the manner of logging the timber and the amount of timber sold (R. 110, 112). This claim was overruled by the Circuit Court of Appeals (R. 1040, 1049). Section 8, which is the one here specifically involved (25 U.S.C. 406) reads as follows:

> "The timber on any Indian allotment, held under a trust or other patent containing restrictions of alienation, may be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit *under regulations* to be prescribed by the Secretary of the Interior." (Italics ours)

Section 7 (25 U.S.C 407), the adjoining section of the same Act, which reveals the differing intent of Congress as between sales of allotted and unallotted lands, reads as follows:

> "The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold *under regulations* to be prescribed by the Secretary of the Interior * * *" (Italics ours)

With respect to the foregoing sections, the Circuit Court of Appeals said: "We think it is without significance that Section 7 authorizes regulations govern-

ing the sale, whereas, Section 8 speaks of consent" (R. 1046; 118 F. (2d) 421, 424).

(b) Petitioners claimed that in the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971) which provides that "roads may be run through said Reservation, on compensation being made for any damage sustained thereby," and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. § 71) providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of the Fifth Amendment (R. 110, 112) and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. § 406) authorizing the Secretary of the Interior to "consent" to a sale by the Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, the Secretary of the Interior does not have the power to impose on the logging of Indian timber on allotted lands in the Quinaielt Reservation, Section 10 of the General Forest Regulations of 1920 (R. 403) providing for the reservation, for scenic, aesthetic, and recreational reasons, of a strip of land on each side of roads, trails and streams, as amended by Regulation 22 of the General Forest Regulations of 1936 (R. 380, 381) reserving a quarter of a mile of timber on each side of the road, which in an amendment to the 1936 Regulations was fixed at two hundred feet on each side of the highway (R. 176) thus in effect enlarging and widening the extensive roads through the Reservation without providing compensation.

(c) The petitioners claimed that, in any event, the regulation of the Secretary of the Interior charging

the Indian allottees a fee of 8% to cover the Government's cost, through the Indian Agency, of supervising, estimating, selling, marking, scaling, collecting, disbursing and the like was illegal and void (R. 108, 112). The Circuit Court of Appeals denies this claim by holding that the Secretary could make regulations prescribing charges for the supervision and sale of Indian timber lands (R. 1049). The petitioners based their claim to exemption from these charges upon the Treaty with the Quinaielt Indians of 1855 (12 Stat. 971) which provides in Article X that:

> "the United States further agrees * * * the expenses * * * of employees * * * to be defrayed by the United States and not deducted from their annunities."

In the light of this Treaty, petitioners further rested on Revised Statutes, § 2079 (25 U.S.C. 71) which provides that while Indian tribes are no longer recognized as independent nations with whom the United States may contract by treaty "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Petitioners contended that the Act of February 14, 1920, as amended (25 U.S.C. § 413) could, in the light of the Indian Treaty and the section of the Revised Statutes declaring a policy against impairment, be construed only as applying to Indian allotments where there was no controlling treaty; in other words, that the Act of 1920 must be construed in such manner as not to conflict with the Treaty and prior statutes, if possible.

The Circuit Court of Appeals ruled that it could

find nothing in the Treaty which could be thought to limit the power of Congress with respect to imposing fees on the gross proceeds of the sale of timber on Indian allotments.

3. The statutory provision under which jurisdiction is invoked is Section 240(a) of the Judicial Code, as amended (28 U.S.C. § 347).

4. The following cases are believed to sustain the jurisdiction of the Supreme Court:

Halbert v. U. S., 283 U.S. 753;
U. S. v. McGowan, 302 U.S. 535;
U. S. v. Powers, 305 U.S. 527;
U. S. v. U. S. Fidelity Co., 309 U.S. 506.

III.

STATEMENT OF THE CASE

The petitioners are Quinaielt Indians, owning trust-allotted lands in the Quinaielt Indian Reservation in the State of Washington. They brought this suit as allottees of lands, on behalf of themselves and of other allottees similarly situated.

The action was instituted against the Superintendent of the Taholah Indian Agency at Hoquiam, Washington, which is the agency of the Department of the Interior and the office of Indian Affairs in the administration of business of the Quinaielt Reservation, and against the Forest Supervisor of the Taholah Indian Agency, they being the persons who enforce the regulations of the Secretary of the Interior on the Quinaielt Reservation. The complaint in the District Court sought a declaration that the Indians have the power

to dispose of the timber on their allotments, and that regulations of the Secretary of the Interior which sought to regulate the sales of timber on Indian lands were illegal and void.

The Quinaielt Indian Reservation has about 200,000 acres, all being allotted land except about 100 acres. Less than 1% of the entire reservation is suitable for use as agricultural land (R. 944). There are 2340 allotments in the reservation, and 18% of it has been logged. All logging has been clear cut up to the summer of 1936. Since then on about 19 allotments the timber has been selectively logged by tree selection and by leaving the stands of timber on parts of the allotments, where no logging has been done, and by the leaving of a 200 foot strip on each side of the Olympic Highway, in the instances where the allotments border on or are cut through by the highway, in which strip no logging is permitted by the Department and by the Agency officials (R. 168, 169). About 100 of the allotment owners have tracts that either border on or are so situated that the Olympic Highway, a main travelled road, cuts through their allotments (R. 167, 168). About 1700 of the original allottees are now living; about 1200 allottees and heirs of deceased allottees live outside of the reservation (R. 165). The petitioners and about 230 others have contracted their timber on allotments for sale to one or more loggers, but no part of the timber on these allotments has been logged (R. 164). About 1400 allottees have made no contracts for the sale of their timber (R. 165). All contracts for the sale of timber were approved by the Secretary of the Interior as provided by law (R. 166).

There are outstanding four contracts for the sale of timber from the Quinaielt Indian Reservation: The Quinaielt Lake Unit sales contract, executed November 8, 1922, approved by the Secretary of the Interior January 18, 1923; the Mounts logging unit contract, executed June 29, 1923, approved by the Secretary of the Interior August 25, 1923; the Hall unit contract, executed January 10, 1928, approved by the Assistant Secretary of the Interior March 19, 1928; the Milwaukee Trail unit contract, executed August 14, 1937, approved by the Commissioner of Indian Affairs October 4, 1937 (R. 165, 166).

The first group of contracts had attached to them Indian Service General Timber Sale Regulations, issued in 1920, which are prescribed by the Department of the Interior as to the sale of Indian lands (R. 475, 477, 400). As of April 23, 1936, the office of Indian Affairs issued a new set of "General Forest Regulations" (R. 359), which were sought to be made applicable to the then existing contracts.

The provisions of the regulations particularly attacked by the Indian petitioners are the following:

1. Section 10 of the 1920 regulations, providing for selective logging (R. 403), which in fact was never enforced as written, prior to 1936, but particularly the enlarged and more specific selective cutting regulations included in the General Forest Regulations of 1936 (R. 359, 360), which provided that whenever practicable 25 to 60% of the merchantable timber should be left standing, to protect the site, provide seed for a new stand, and make possible a second cut before reproduction matures, and to preserve the forest for scenic pur-

poses along public highways, in the vicinity of Indian and white communities, and wherever the recreational or aesthetic value of the forest seems to exceed its value for the production of forest products (R. 361).

The Indian petitioners challenge the foregoing regulations as a violation of the Quinaielt Treaty of 1855 (12 Stat. 971), and of the Fifth Amendment, and as beyond the power of the Secretary of the Interior and his enforcement officers under the provisions of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857).

2. The petitioners challenge especially that provision of Section 10 of the General Forest Regulations of 1920 (R. 403), providing for the reservation of a strip of timber on each side of roads, trails and streams, and in the vicinity of camping places and recreation grounds, as amended by regulation 22 of the General Forest Regulations of 1936 (R. 380, 381), reserving a quarter of a mile on either side of the road, which in an amendment to the 1936 regulations was reduced to 200 feet on each side of the highway.

The Indian petitioners challenge the foregoing regulations upon the ground that they violate the Treaty of 1855, which provides that "if necessary for the public convenience, roads may be run through said reservation *on compensation being made for any damage sustained thereby*," and the Fifth Amendment, the effect of the permanent reservation of timber along highways, trails and streams, for scenic purposes being to widen the highway area for long distances, and to take large areas of timber for public use, and taking from the Indian timber owner his timber without compensa-

tion in direct violation of the Treaty, and the Fifth Amendment.

3. The provision of Section 50 of the General Forest Regulations of 1920 (R. 413, 414), charging the Indians an amount of 10% from the gross proceeds of sale to cover the Government's expenses, through the Indian Agency, of examining, advertising, marking, scaling, protecting the timber, and supervising the sale, as amplified by regulation number 19 of the General Forest Regulations of 1936 (R. 376), fixing the amount of compensation to the Government for said purposes at 8% of the gross amount received for the timber sold under regular supervision (R. 376).

The Indian petitioners challenge the foregoing regulations upon the ground that under Article 10 of the Treaty of 1855, which provides that "the United States further agrees * * * the expenses * * * of employees * * * to be defrayed by the United States * * *", and under Revised Stat. § 2079 (25 U.S.C. § 71), which protects all Indian treaties prior to March 3, 1871, against impairment, the Secretary of the Interior can impose no charge for the supervision of Indian timber lands and sales thereon.

The District Court denied the defendants' motion to dismiss (R. 77; 28 F. Supp. 807) and later decided the cause on the merits in favor of the complainant Indians, holding the regulations sought to be enforced by the defendants invalid; and that the petitioners were suffering substantial and immediate detriment and irreparable injury, in that the enforcement of the regulations deprived the allottees of the right, conferred by Congress, to sell their timber, and illegally withheld

large portions of their timber from sale. The trial court therefore enjoined the enforcement of these regulations and any interference with the logging operations that the Indians might desire to have carried on under the sales contracts entered into by them (R. 150, 185; 31 F. Supp. 754).

The foregoing decision was reversed by the Circuit Court of Appeals for the Ninth Circuit (R. 1040; 118 F. (2d) 421). This decision of the Circuit Court of Appeals the Indian petitioners earnestly seek to review here.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that notwithstanding the Quinaielt Indian Treaty of 1855 (12 Stat. 971), which by adopting Article 6 of the Treaty with the Omahas restrains alienation only as to allottees who locate *permanent homes*, which has not been the case as to Quinaielt allotments, and notwithstanding the Fifth Amendment with respect to due process of law and just compensation, and notwithstanding Sections 7 and 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §§ 407 and 406), the Secretary of the Interior had power, in connection with and after giving his consent to the sale of timber by members of the Quinaielt Indian Tribe on allotted lands, to impose a system of regulations concerning the manner and places of logging the timber and the amount of timber to be sold.

2. The Circuit Court of Appeals erred in holding that notwithstanding the Quinaielt Treaty of 1855 (12

Stat. 971), which provides that "roads may be run through said Reservation, on Compensation being made for any damage sustained thereby", and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. § 71), providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of the Fifth Amendment with respect to due process of law and just compensation, and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. § 406), authorizing the Secretary of the Interior to "consent" to a sale by the Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, the Secretary of the Interior has the power to impose on the logging of Indian timber on allotted lands in the Quinaielt Reservation, Section 10 of the General Forest Regulations of 1920 (R. 403), providing for the reservation, for scenic, aesthetic, and recreational reasons, of a strip of land on each side of roads, trails and streams, as amended by Regulation 22 of the General Forest Regulations of 1936 (R. 380, 381), reserving a quarter of a mile of timber on each side of the road, which in an amendment to the 1936 Regulations was fixed at two hundred feet on each side of the highway (R. 176), thus in effect enlarging and widening the extensive roads through the Reservation without providing compensation.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the regulations (R. 413, 414, 376) of the Secretary of the Interior charging a fee of 8% for the supervision and sale of timber on allotted lands was a valid regulation, notwithstanding the pro-

vision of the Quinaielt Indian Treaty of 1855 (12 Stat. 971) providing that the expenses of employees of the United States are to be defrayed by the United States, and Section 2079 of the Revised Statutes (25 U.S.C. § 71) providing that Indian treaties prior to March 3, 1871, should not be invalidated or impaired.

V.

ARGUMENT

Point A

The Decision Below Conflicts with Decisions of this Court

In its construction of the statutes involved, the decision of the Circuit Court of Appeals for the Ninth Circuit conflicts with *U. S. v. Algoma Lumber Co.*, 305 U. S. 415, in which it is held that the Indians are the actual beneficial owners of the allotted lands and that the contracts to sell timber on allotted lands are contracts between the Indian allottees and the purchasers, and that the Government is not a party to these contracts. The contracts were those of the Indians and not of the United States (305 U.S. 415, 422, 423). Therefore the Secretary could not, at the time of giving his consent or thereafter (as in the case of the 1936 regulations), attempt to add regulations to the contract. He was not a party to the contract. Congress empowered him solely and only to consent or refuse to consent to the contract between the actually contracting parties. If he gave his consent to the sale, which was the extent of his authority under the statute, the consent was effective, but the regulations sought to be attached to the contract were void.

The decision of the Circuit Court of Appeals also conflicts with *United States v. Shoshone Tribe*, 304 U.S. 111, 116-117, holding that the Indians are the substantial owners of reservation lands, and not the United States, and with *Chippewa Indians v. United States*, 301 U.S. 358, 375-6, holding the power of the government to manage Indian lands "is subject to constitutional limitations and does not enable the government * * * to deal with them as its own." While the government as to its own lands can dedicate to public use for scenic and recreational purposes large timber lands along roads, trails, and streams, it is submitted that it cannot do so as to Indian lands without providing for just compensation.

Point B

Important Questions of Indian Rights Are Involved Warranting Determination by this Court

(a) In the light of the Indian Treaty, the Fifth Amendment and the Statutes, the Secretary had no power to make the Regulations here involved.

The Quinaielt Treaty of 1855 (12 Stat. 971) in Article VI authorized the President to assign lots to individuals or families "on the same terms and subject to the same regulations as are provided in the Sixth Article of the treaty with the Omahas so far as it may be applicable." The Sixth Article of the Treaty with the Omahas (10 Stat. 1043, 1044) authorized the President to make allotments for *permanent homes*, and, *in such case only*, may impose the condition that the land shall not be aliened. But "these [Quinaielt] Indians are not the usual reservation Indians. They were

never placed on the reservation *or required to live within its limits.*" *Halbert v. United States*, 283 U.S. 753, 761. Only a very few of the many allottees actually live on the reservation, and their lands and the timber thereon are, therefore, not subject to restraints on alienation, so far as the treaty is concerned, and they own their lands and the timber thereon with ordinary powers of disposition, free of restraints as far as 25 U.S.C. § 406 is concerned, and hence free of consent or regulations.

In any event, if a valid restraint on alienation does exist, in Sections 7 and 8 of the Act of June 25, 1910, Congress sharply distinguished between the sale of timber on allotted lands and on unallotted lands. With respect to sales of timber on allotted lands, Congress provided that such timber might be sold *under regulations* to be prescribed by the Secretary of the Interior; but Congress provided that timber on allotted lands might be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof paid to the allottee *under regulations* to be prescribed by the Secretary of the Interior. The Circuit Court said that this clear and sharp difference in the text of the two adjoining sections as to how the power should be exercised was without significance. As to the timber on allotted lands here involved, it was clearly the intent of Congress that it could be sold *by the allottee*, on such terms as the allottee might prescribe, but that the sale on the terms and conditions fixed by the allottee would have to be submitted for the consent or rejection of the

Secretary. The learned trial judge pertinently said (R. 157, 158; 31 F. Supp. 754, 761):

"As I read the Statute, I am more impressed than ever with the thought that the object of the Congress was to grant to Indians certain rights which they did not have before as to timberlands and other matters.

"To me, the provisions of Sections 406 and 407 are absolutely meaningless, if we insist, as do the defendants, that under Section 405, or under the general control implied from the restraint on alienation, the Secretary of the Interior may, in the exercise of his own judgment, attach to sales conditions other than those which Congress prescribed. The only conditions, under Section 406, are that, on a sale of the timber by an Indian allottee (1) the consent of the Secretary of the Interior must be obtained and (2) the proceeds must be paid to the allottee or disposed for his benefit under *regulations* prescribed by the Secretary of the Interior.

"I cannot see how a Statute, which merely allows a Governmental officer to approve a contract and to control the disposition of the moneys derived from it, would give him power to condition his consent on regulations which he has no power to make and which add to the conditions of sale which the Congress has prescribed. The 'means' chosen by the Congress to control the sale of timber are exclusive of all others.

* * * * * * * *

"For, under such interpretation, [of the Secretary] the Indian can sell only the portion which the *Secretary of the Interior says he may.* However, as the Congress has said that the timber may

> be sold by the allottee, this *means all*—subject only to the consent of the Secretary of the Interior. The Secretary might refuse his consent without giving *any* reason at all. But he cannot condition it upon the imposition upon the Indian of a restriction, which he has no right to make, even though he may think it for the benefit of the group as a whole."

Congress intended that as to timber on allotted lands, the allottees should have the full power to sell and specify the terms of sale, and that the Secretary should have the power of consent or refusal, but it did not give him the power to give his consent and at the same time, or later, add regulations concerning the sale, as in the case of unallotted lands.

(b) The regulation setting aside 200 feet of timber on each side of the road was a taking of property for road purposes without compensation, in violation of the Quinaielt Treaty and in violation of petitioners' constitutional rights.

As to the regulation setting aside, for aesthetic and recreational purposes, 200 feet of timber on each side of the road for many miles in the Reservation, the Secretary, in substance and in fact, has enlarged and widened the extensive road areas throughout the Quinaielt Reservation, without providing compensation therefor, in what seems a manifest violation of the Quinaielt Treaty of 1855, a result that Congress clearly never intended or authorized, and which amounts to a taking of Indian property. *U. S. v. Klamath Indians*, 304 U.S. 119, 123; *Chippewa Indians v. U. S.*, 301 U.S. 358, 375-6; *Portmouth Co. v. U. S.*, 260 U.S. 327

(where government acts were held to amount to a taking).

(c) The regulation whereunder the Secretary charges the Indian allottees 8% of the gross proceeds of the timber sale violates the Quinaielt Treaty.

The Treaty with the Quinaielts of 1855 (12 Stat. 971) provides in Article X that:

> "the United States further agrees * * * the expenses * * * of employees * * * to be defrayed by the United States and not deducted from their annuities,"

Revised Statutes, Section 2079 (25 U.S.C. § 71) provides that while Indian tribes are no longer recognized as subject to the treaty-making power, yet no obligation of any treaty lawfully made or ratified with any Indian tribe or nation prior to March 3, 1871, should be invalidated or impaired. The Act of February 14, 1920 (25 U.S.C. 413) authorizing the Secretary in substance to charge reasonable fees for the supervision and sale of Indian timber lands, should, in the light of the Treaty and earlier statutes, be construed as applying only to the allotment of Indians not protected against expense of Governmental employees by a treaty antedating 1871. Thus construed the Act of February 14, 1920, as amended, is consistent with the Treaty and the prior statute, a result that should be judicially striven for if possible.

U. S. v. Payne, 264 U.S. 446;
Jones v. Meehan, 175 U.S. 1, 11;
U. S. v. Nez Perce County, 95 F. (2d) 232, 235-236.

Point C

Treaties and Statutes Affecting Indian Rights Should Be Liberally Construed

This cause involves treaty rights and statutory rights of Indians, which this Court has constantly said should be liberally construed (*U. S. v. Payne*, 264 U. S. 446, 448-9), and as to treaty rights particularly should be construed with "enlarged rules of construction," and "in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11; *Choate v. Trapp*, 224 U.S. 665, 675. This Court, recognizing the peculiar position of the Indian in this country, has been most solicitious that his rights be not denied except upon the judgment of the highest court in the land. Consequently this Court has often and recently granted certiorari in cases affecting the rights of Indians, *e.g.*:

Klamath & Modoc Tribes v. U. S., 296 U.S. 244;
Cate v. Beasley, 299 U.S. 30;
British American Oil Co. v. Board, 299 U.S. 159;
Shoshone Tribe v. U. S., 299 U.S. 476;
U. S. v. Seminole Nation, 299 U.S. 417;
U. S. v. McGowan, 302 U.S. 535;
Creek Nation v. U. S., 302 U. S. 620;
U. S. v. Shoshone Tribe, 304 U.S. 111;
Minnesota v. U. S., 305 U.S. 382;
U. S. v. Algoma Lumber Co., 305 U.S. 415;
U. S. v. Powers, 305 U.S. 527;
U. S. v. United States Fidelity & G. Co., 309 U.S. 506.

CONCLUSION

Before closing it should be noted in passing that the Circuit Court held, in the last paragraph of its opinion (R. 1049-1050) that it need not determine whether the Secretary of the Interior was an indispensable party to the suit and that it would assume that the action could properly be maintained against his subordinates who were actually undertaking to enforce the challenged regulations on the Indian Reservation. The following authorities support the view that the action could so properly be maintained against the subordinates of the Secretary who were carrying into effect the alleged wrong complained of by the petitioners:

Colorado v. Toll, 268 U.S. 228, 230;
Missouri v. Holland, 252 U.S. 416, 431;
Berdie v. Kurtz, 75 F. (2d) 898;
Brooks v. Dewar (U. S. Sup. Ct.) May 26, 1941.

We earnestly pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 141

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, SUPERINTENDENT OF TAHOLAH INDIAN AGENCY, AND JAMES A. HOWARTH, JR., UNITED STATES FOREST SUPERVISOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court (R. 77–82, 150–164) are reported in 28 F. Supp. 807 and 31 F. Supp. 754. The opinion of the Circuit Court of Appeals (R. 1040–1050) is reported in 118 F. (2d) 421.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 10, 1941 (R. 1050). The petition for a writ of certiorari was filed June 7, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Indian allotments involved in the present case are restricted against alienation.

2. Whether the Secretary of the Interior has authority under Section 8 of the Act of June 25, 1910, to prescribe regulations governing the sale of timber on restricted Indian allotments.

3. Whether the Secretary of the Interior has authority under the Act of February 14, 1920, to deduct from the gross proceeds the expenses of supervising the sale of timber from allotments on the Quinaielt Reservation.

TREATIES AND STATUTES INVOLVED

The Act of June 25, 1910, c. 431, 36 Stat. 855, 857, 25 U. S. C. §§ 406, 407, provides:

> § 7. SALE OF TIMBER ON UNALLOTTED LANDS. The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reserva-

tion in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.

§ 8. SALE OF TIMBER ON ALLOTMENTS HELD UNDER TRUST. The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

The pertinent provisions of the Treaty of July 1, 1855, with the Quinaielt Indians, 12 Stat. 971; the Treaty of March 16, 1854, with the Omahas, 10 Stat. 1043; the General Allotment Act of February 8, 1887, c. 119, secs. 1 and 5, 24 Stat. 388, 25 U. S. C. §§ 331 and 348; and the Act of February 14, 1920, c. 75, sec. 1, 41 Stat. 415, are set forth in the Appendix, pp. 13–17, *infra.*

STATEMENT

Petitioners, on behalf of themselves and all other allottees similarly situated, sought to enjoin the United States and its officers from enforcing regulations of the Secretary of the Interior governing the sale of timber from Indian lands.

The relevant facts as found by the District Court (R. 164–180) may be summarized as follows:

The Quinaielt Reservation in the State of Washington contains about 200,000 acres and is prin-

cipally valuable for lumber production. It was created pursuant to the Treaty of July 1, 1855, with the Quinaielt Indians, 12 Stat. 971, and was subsequently enlarged by Executive Order of November 4, 1873. 1 Kappler, Indian Laws and Treaties (1904), p. 923. Almost all of the reservation has been allotted to individual Indians, many of whom do not reside on their allotments (R. 165).

Between 1923 and 1937 the Secretary of the Interior approved four contracts, each of which provided for the sale of timber on a number of allotments (R. 165–166). Petitioners and the Indians whom they represent own allotments which are covered by these contracts (R. 166). Regulations promulgated by the Secretary on April 10, 1920, were made a part of each of the contracts (R. 169). These regulations (R. 42–57) contain fifty-six separate sections which set forth detailed provisions designed, among other things, to assure the Indians of prompt and full payment, and to prevent waste and loss by fire. Section 10 requires that selective logging be practiced so as to preserve part of the merchantable timber, promote young growth and preserve forest cover and authorizes the prohibition of cutting in a strip 300 feet on each side of roads and streams.[1] Section 50 provides that not

[1] Section 10 provides:

"Selective logging, or the logging of areas in such manner as to preserve a part of the merchantable timber, promote the growth of young trees, or preserve the forest cover, will be practiced on all lands chiefly suitable for the production

more than 10% of the proceeds of the sale should be set aside to cover the expense of supervising the cutting and sale.

On April 23, 1936, new regulations (R. 359–385) were promulgated which among other things make the selective logging requirements more specific and reduce the deduction for expenses to 8% of the proceeds. These regulations, as amended in November 1936, provide that in the west coast timber region a strip be reserved along highways 200 feet wide in which only dead and down trees should be cut (R. 175–176).

The regulations requiring selective logging were never enforced in the Pacific Northwest before the summer of 1936 because no equipment had been devised which could selectively log such territory as the Quinaielt Indian Reservation. In 1936 the caterpillar logging tractor and the large logging transportation truck came into use and made selective logging possible (R. 170). Since that time, as the evidence shows, selective logging has been

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of timber crops. Live trees of diameters below those named in the contract may be designated for cutting, and larger trees may be reserved from cutting in the discretion of the officer in charge. If live trees which are not designated for cutting are cut, or are seriously injured through lack of care, they will be double scaled and so charged and paid for. In the discretion of the officer in charge, a strip not exceeding three hundred (300) feet in width on each side of streams, roads, and trails and in the vicinity of camping places and recreation grounds may be reserved, in which little or no cutting will be allowed."

enforced so as to reserve from cutting approximately 30% of the volume of the timber composed principally of the smaller and less merchantable trees (R. 608–611, 783–785, 877, 904–905).

In their amended complaint petitioners took the position that the regulations were unlawful, that they have the right to cut timber "according to their own wants and without charges or taxes," and that they were entitled to an injunction against interference with such logging (R. 112–113). The trial court ruled in favor of petitioners, holding that under the 1910 Act the Secretary of the Interior could not condition his consent upon conformance with regulations, but could only refuse to approve contracts "improvident from the standpoint of price" (R. 158). The Circuit Court of Appeals reversed, holding that the conditions under which a contract should be approved were left to the judgment of the Secretary and that the regulations were an appropriate exercise of that discretion.

While finding it unnecessary to decide whether the Secretary of the Interior was an indispensable party, the Circuit Court of Appeals further held (R. 1044–1045) that the suit should be dismissed as against the United States because it had not consented to be sued. Petitioners do not challenge this ruling. Thus, the sole question here presented is whether the court below erred in holding that the complaint does not state a cause of action against the other respondents.

ARGUMENT

1. The court below held that the allotments on the Quinaielt Reservation are subject to restrictions against alienation (R. 1045–1046). This holding is plainly correct. It is not disputed that each Indian received a restricted patent which provided that his allotment was to be held in trust by the United States for twenty-five years (R. 167).[2] However, petitioners contend (pp. 7–8, 27–28) that there was no basis for the insertion of restrictions against alienation in the patents given to Indians not residing on the reservation. This argument is predicated upon Article VI of the Treaty of 1855 with the Quinaielts, 12 Stat. 971, 973, which authorizes the President to make allotments "for a permanent home" upon the condition "that the tract shall not be aliened" (App., pp. 13, 14–15, *infra*). Since the treaty does not authorize allotments for any purpose other than a permanent home, petitioners' argument merely tends to show that allotments to Indians living off the reservation are subject to cancellation under the express terms of the treaty. The argument does not demonstrate that those allotments were free from restrictions.

Moreover, petitioners ignore the fact that the allotments were made in conformity with the Gen-

[2] The trust period has not expired, having been indefinitely extended by Executive Order (R. 828–831) and by the Act of June 18, 1934, c. 576, sec. 2, 48 Stat. 984, 25 U. S. C. § 462.

eral Allotment Act of February 8, 1887, c. 119, sec. 1, 24 Stat. 388, 25 U. S. C. § 331 (App., p. 15, *infra*), which authorized the President to issue restricted trust patents to lands on any Indian Reservation. This Court has held that, when harmonized with the Treaty of 1855, that Act authorized the allotment of timber lands on the Quinaielt Reservation to Indians not residing upon the Reservation. *United States* v. *Payne,* 264 U. S. 446, 448–449; *Halbert* v. *United States,* 283 U. S. 753, 760–762. Thus it is plain that the restrictions in the patents were properly inserted pursuant to the directions contained in the General Allotment Act.

2. The restrictions upon alienation prevent the sale of the timber growing upon the allotment as well as the sale of the land itself. *Starr* v. *Campbell,* 208 U. S. 527, 534. Prior to 1910 no general authority to sell timber from Indian lands existed (R. 1046; H. Rept. No. 1135, 61st Cong., 2d Sess.). This limitation, however, was relaxed by Sections 7 and 8 of the Act of June 25, 1910 (p. 2, *supra*). Petitioners do not contend that the limitation on the sale of timber was completely removed, for they admit (pp. 6, 9, 26, 28–30) that under Section 8 the Secretary of the Interior might absolutely refuse to consent to a sale. But they assert (p. 6) that the Secretary's approval or rejection has to be "absolute."

On the contrary, it is well established that the grant to an administrative officer of the plenary

power to approve or reject a sale includes the lesser power to "consider and determine the terms and conditions on which such sales should be approved." *United States* v. *Thurston County, Neb.*, 143 Fed. 287, 291 (C. C. A. 8). See also *Starr* v. *Campbell*, 208 U. S. 527, 533–534; *Sunderland* v. *United States*, 266 U. S. 226, 235; *Mott* v. *United States*, 283 U. S. 747, 751. Plainly, because of the number of Indians with whom he must deal, the vast area of land involved, and the many details which have to be taken into account in the logging and sale of timber, the Secretary's power under Section 8 of the Act can only be effectively administered by the use of general regulations stating the terms and conditions upon which he will consent to the sale of timber on restricted Indian allotments. *LaMotte* v. *United States*, 254 U. S. 570, 576.

To support their contention that there is no statutory authority for regulations governing the sale of timber from allotted lands, petitioners rely (pp. 8–10, 28–30) on the fact that the word "consent" is used in Section 8 while Section 7 speaks of sales "under regulations to be prescribed by the Secretary." They assert that Congress intended thereby to deny the Secretary the power to make regulations governing sales from allotted lands. The legislative history of the 1910 Act discloses no such intention but rather that the same regulatory authority was intended to be granted

as to both allotted and unallotted lands.[3] Moreover, the Department of the Interior has for thirty years consistently construed the 1910 Act as authorizing regulations governing the sale of timber from allotted as well as from unallotted lands.[4]

Contrary to petitioners' contention (pp. 6, 26) the decision of the court below is not in conflict with the decision of this Court in *United States* v. *Algoma Lumber Company,* 305 U. S. 415. That case involved contracts for the sale of timber from allotted and unallotted lands on the Klamath Reservation which "were executed pursuant to §§ 7 and 8 of the Act of 1910 and regulations of the Secretary of the Interior." The Court said (p. 421):

> The action of Congress in authorizing the sale of timber, and the contracts prescribed under its authority by departmental regulations and approved by the Secretary, are to be viewed as the means chosen for the exercise of the power of the Government to protect the rights and beneficial ownership of

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[3] See H. Rept. No. 1135, 61st Cong., 2d sess., p. 3; H. Rept. No. 1727, 61st Cong., 2d sess.; S. Rept. No. 868, 61st Cong., 2d sess.; 45 Cong. Rec., pt. VI, pp. 6085–6088; *id.*, pt. VIII, pp. 8723–8727, 8897–8901, 8982, 9102.

[4] Annual Reports, Department of the Interior, 1910, Vol. II, pp. 25–26; Regulations, June 29, 1911 (Def. Ex. 16, original); Regulations, February 5, 1918 (Def. Ex. 17, original); Regulations, April 10, 1920 (R. 42–57); Regulations and Instructions, 1927 (Def. Ex. 18, original); Regulations, April 23, 1936 (R. 359–385).

the Indians. The means are adapted to that end.

Nor does the decision below, as petitioners urge (pp. 6–7; 30–31), conflict with *United States* v. *Shoshone Tribe,* 304 U. S. 111, or *Chippewa Indians* v. *United States,* 301 U. S. 358. The regulation (R. 175–176) prohibiting cutting along stocked streams, roads, and in the vicinity of ceremonial sites, was regarded by the Secretary as in the best interests of the Indians and the court below recognized (R. 1049) that it was "not at liberty to substitute its judgment for that of the Secretary." Clearly, there is no basis for petitioners' assertion that this regulation amounts to an appropriation by the Federal Government of Indian property for public use without the payment of just compensation.

3. Specific statutory authority is found in the Act of February 14, 1920, c. 75, 41 Stat. 415, for the regulation (R. 376–378) providing that 8% is to be deducted from the gross proceeds of timber sales to cover the cost of advertising and supervising the sales. Petitioners, however, contend that if this Act were construed as applying to the Quinaielt Reservation it would violate Article X of the Treaty of 1855. In support of this contention they quote (pp. 4–5, 18, 23, 31) carefully selected excerpts from Article X. A reading of the article in its entirety (App., p. 13, *infra*) demonstrates

that petitioners' contention is wholly without foundation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1941.

APPENDIX

The pertinent provisions of the Treaty of July 1, 1855, with the Quinaielts, 12 Stat. 971, are as follows:

> ARTICLE VI. The President may * * * further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. * * *
>
> * * * * * *
>
> ARTICLE X. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the

> said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

The pertinent provision of the Treaty of March 16, 1854, with the Omahas, 10 Stat. 1043, 1044, is as follows:

> ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale,

> or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

The pertinent provisions of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, are as follows:

> SEC. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipula-

tion or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: * * *.

* * * * *

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

The Act of February 14, 1920, c. 75, 41 Stat. 415, provides:

> That hereafter in the sale of all Indian allotments, or in leases, or assignment of leases, covering tribal or allotted lands for mineral, farming, grazing, business or other purposes, or in the sale of timber thereon, the Secretary of the Interior be, and he is hereby, authorized and directed, under such regulations as he may prescribe, to charge a reasonable fee for the work incident to the sale, leasing, or assigning of such lands, or in the sale of the timber, or in the administration of Indian forests, to be paid by vendees, lessees, or assignees, or from the proceeds of sales, the amounts collected to be covered into the Treasury as miscelaneous receipts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

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Petitioners,

vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor,
Respondents.

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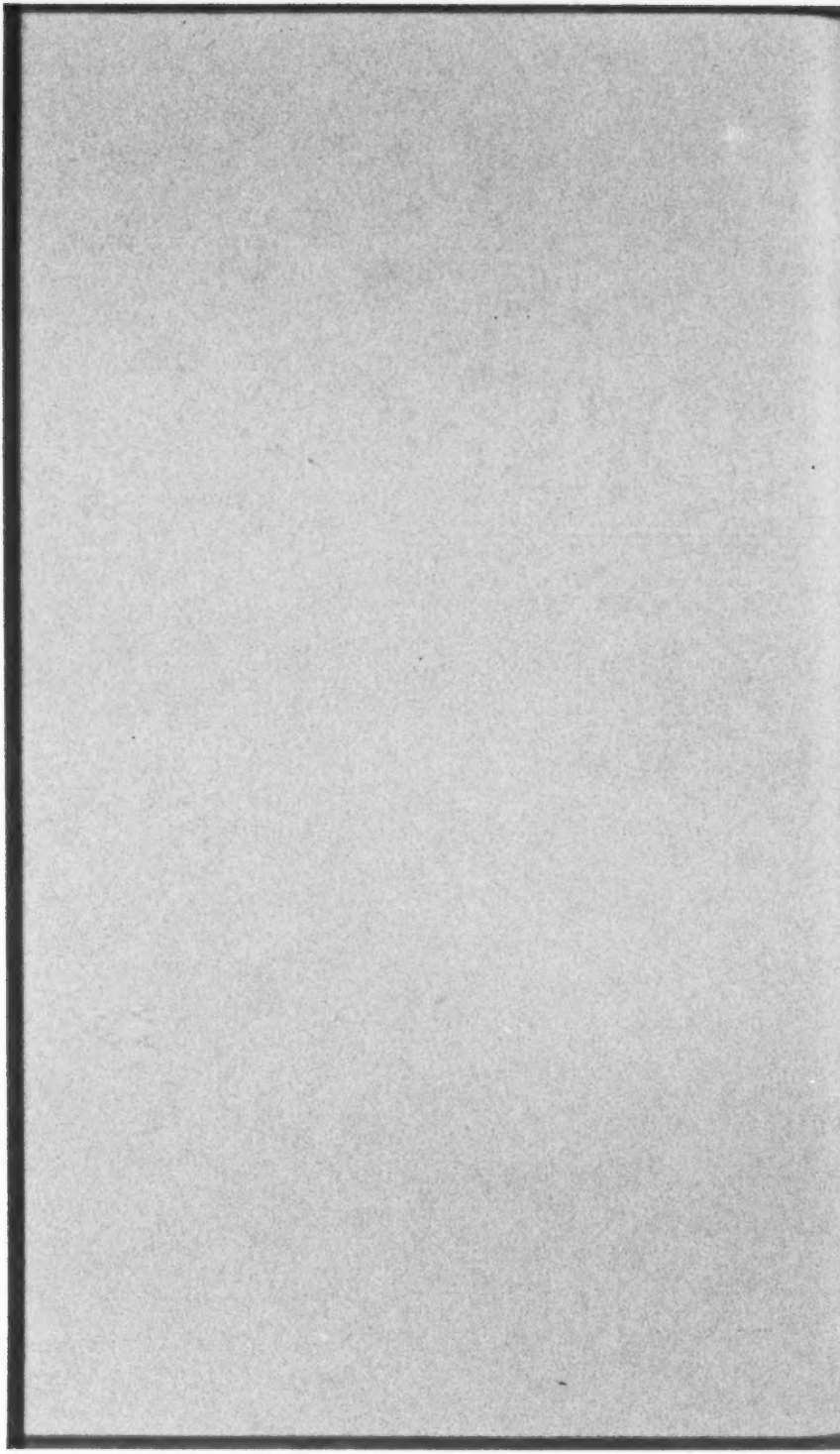

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BRIEF FOR THE PETITIONERS IN REPLY

ARGUMENT

In view of the respondents' assumptions in their Brief in Opposition, as to the nature of petitioners' treaty rights, we offer, in the interest of clarity, a very short further statement of such rights.

In the treaty of 1855 (12 Stat. 971, Article II) the Quinaielts and the Quilleutes ceded large tracts of land to the United States *and reserved unto themselves* lands to be set aside by executive order. The Quinaielts hold the lands "under their original title" thus reserved within the established boundaries of the Quinaielt Reservation. *U. S. v. Romaine*, 255 Fed. 253, 260. By reason of the title reserved to them-

selves, they have title to the fish in the rivers of the reservation and the federal government has no right to make rules or regulations in regard thereto. *Mason v. Sams*, 5 F. (2d) 255. They have a vested right in the timber on their allotments. *U. S. v. Ferry County*, 24 F. Supp. 399; *U. S. v. Algoma Lumber Co.*, 305 U. S. 415. There is no prohibition as to buying or selling in the treaty of 1855, excepting those found in Article 11 and Article 12, namely to free their slaves and not to purchase or acquire others and not to trade at Vancouver Island or elsewhere outside of the United States. In this respect the treaty of 1855 is a treaty of commerce and is the supreme law of the land. *U. S. v. City of Salamanca*, 27 F. Supp. 541, 543-544. Commerce with the Indian tribes means commerce with the individuals composing those tribes. *U. S. v. Holiday*, 3 Wall. (70 U. S.) 407, 417. The rights under the treaty of 1855 are property rights, and are *vested* in the Indians holding allotments in the Quinaielt Reservation, and the government cannot alter those rights. *Williams v. Johnson*, 239 U. S. 414, 420; *Sizemore v. Brady*, 235 U. S. 441, 449; *Choate v. Trapp*, 224 U. S. 665; *English v. Richardson*, 224 U. S. 680; *Jones v. Meehan*, 175 U. S. 1; *Chase v. United States*, 222 Fed. 593, 596; *Morrow v. United States*, 243 Fed. 854, 856. Citizenship to the Indian does not destroy those rights. 43 Stat. 253, 8 U. S. C. §3. The Quinaielt Treaty having been made prior to March 3, 1871, it shall not be impaired by Congress. 16 Stat. 566. 25 U. S. C. §71. *Taylor v. U. S.*, 44 F. (2d) 531. While Congress may ordinarily pass stat-

utes affecting treaties in some particulars, it cannot disturb property rights of Indians where those rights have already vested under a treaty. *Sizemore v. Brady*, 235 U. S. 441, 450; *Choate v. Trapp*, 224 U. S. 665, 671. Thus any statute or any rule or regulation that takes away or holds back or reduces the amount or makes any charges in the holding or in the selling of the timber in the Quinaielt Reservation in the hands of individual allottees or their heirs is invalid and runs counter to the federal constitution.

The government admits that it has left uncut and unsold under sales contracts, as examples, R. 811, (a) to the extent of 40% of $2797.00; (b) to the extent of $5000.00; (c) to the extent of $4500.00; (d) to the extent of $3571.47 from 30 acres and 50 acres not touched; (e) to the extent of $1200.00; (f) to the extent of twice the $1003.44, and others, including (g) R. 1011, 40% left standing on the area logged, resulting in a 20% blowdown in three years of the part left standing, with no compensation paid in any instance.

With this clarifying background, we now reply specifically to respondents' argument.

1. The respondents (Respondents' Brief p. 7) challenge our point that there was no basis for the insertion of restrictions against alienation in the patents given to the Quinaielt Indians not residing on the Reservation. This point is important for the purpose of determining whether the provisions of Section 8 of the Act of June 25, 1910 (25 U. S. C. §406) are applicable inasmuch as the section provides that "the timber on any Indian allotment sold under a trust or

other patent containing restrictions on alienation, may be sold by the Indian allottee."

Our first point is that by reason of the Treaty of 1855 and the special Act of March 4, 1911 (36 Stat. 1345, 1346) under which the present Quinaielt allotments were made to the non-resident Indians, no such restriction is applicable.

Under the Treaty of 1855 it is only in the case where the allotment is for permanent home on the Reservation that the President can impose the condition that the land shall not be aliened. Where allotments of reservation lands are made to these Indians who have never resided on the Reservation, the treaty restraint on alienation does not reply. Allotments were made to the Quinaielt Tribes under the special Act of March 4, 1911 (36 Stat. 1345, 1346). See *Halbert v. U. S.*, 283 U. S. 753; *U. S. v. Payne*, 264 U. S. 446. The special Act of March 4, 1911, under which these Quinaielt allotments were made, invoked the General Allotment Act of February 8, 1887 (25 U. S. C. §§331-348) only so far as the latter Act was applicable in the light of the Treaty and the Act of 1911, because as far as the Quinaielts are concerned the General Allotment Law of 1887 and the Act of March 4, 1911, must be harmonized with the Treaty. *U. S. v. Payne*, 264 U. S. 446.

Thus, while the allotments on the Quinaielt Reservation under the special Act of March 4, 1911, were to be made under the "allotment laws of the United States," it was held in the light of the Treaty and of the special Act of 1911 that the provisions of the residence requirement of Section 1 of the General Allot-

ment Law were not applicable to these Quinaielt allotments. *Halbert v. U. S.*, 283 U. S. 753, 761-2. Nor, because of the Treaty, does the provision of the General Allotment Law confining allotments to lands "advantageous for agricultural and grazing purposes," apply to the Quinaielt allotments made under the Act of 1911. *U. S. v. Payne*, 284 Fed. 827, affirmed 264 U. S. 446. The Ninth Circuit Court of Appeals in *U. S. v. Payne*, 284 Fed. 827, 828, said:

> "The provisions of the treaty contained no restriction as to the character of the land to be located, and we do not regard the provisions of the Act of 1887 [General Allotment Law] *supra*, as so limiting the authority of the President that he may not order allotment of lands included in the reservations made under the treaty provisions and surveyed * * *. Furthermore, judicial knowledge will be taken of the fact that, when the treaty was made, the reservation was in a timbered area of the country."

This Court, in affirming the foregoing decision, followed the Circuit Court of Appeals in its reasoning as follows, 264 U. S. 446, 448:

> "The treaty makes no restriction in respect of the character of the land to be 'assigned'; and while the Allotment Act, being later, must control in case of conflict, it should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done, since an intention to alter, and, *pro tanto*, abrogate, the treaty, is not to be lightly attributed to Congress * * *.
>
> "Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do, *Hauenstein v. Lynham*, 100 U. S. 483, 487, we conclude that the character of the lands there-

after to be set apart for them severally was not restricted."

Consequently the allotments to the Quinaielts under the special Act of 1911 were of all lands on the Reservation regardless of their agricultural or grazing character and even though unsuitable for such purpose, all in accordance with the Treaty, which "makes no restriction in respect of the character of the land to be 'assigned.'" *U. S. v. Payne, supra*, 264 U. S. 446, 448. As previously pointed out, all of the 200,000 acres in the Reservation has been allotted except about 100 acres, and less than 1% is suitable or valuable for any other purpose than as timber land. It is rough and rugged country, suitable for neither agriculture nor grazing.

It is thus plain that Section 5 of the General Allotment Act (24 Stat. 388; 25 U. S. C. §348), just as certain other portions of the General Allotment Act which have been held inapplicable to the Quinaielt Reservation, does not apply to these Quinaielt allotments.

So far as the Treaty is concerned, the President could restrain alienation only where the allotment was for a permanent home. Concededly the very great majority of the allottees have never lived on the Quinaielt Reservation, but under the Act of 1911 were entitled to allotments nevertheless, so far as the Treaty is concerned, without restraint. The allotments to the non-resident Quinaielts under the Act of 1911 involved no domiciliary or home-creating concept. That Act merely intended to divide up among the non-resident members of the Tribes the land that

was left after the few Indians permanently residing on the Reservation had been taken care of. This is shown by the proviso of the 1911 Act, to-wit:

> "Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians *thereon* have been completed."

See *Halbert v. U. S.*, 283 U. S. 753, 758.

Thus Section 5 of the General Allotment Act (25 U. S. C. 348) never applied to these allotments. The 25-year trust patents were to be issued under that section only with respect to "allotments provided for in sections 331 to 334, inclusive, and 336 * * *." These sections relate only to Indians "*located on*" lands which may "be advantageously utilized for agricultural or grazing purposes by the Indians." As pointed out, and held by this Court, this had never been the situation in the case of allotments on the Quinaielt Reservation under the special Quinaielt Allotment Act of 1911, under which, as construed by this Court, there is (1) no residence requirement, and (2) in the light of the treaty, "no restriction in respect of the character of the land assigned."

In the light of the Treaty, therefore, and the Act of 1911, under which these Quinaielt allotments are made, these allotments are free of any lawful restraint on alienation, because the Secretary had no legal authority to insert any restraints in patents caused to be issued by him under the special Quinaielt Allotment Act of 1911. The power of the Secretary of the Interior to impose restrictions on the alienation of property by an Indian under Section 5 of the Gen-

eral Allotment Act is statutory only, *U. S. v. Watasche*, 21 F. Supp. 903, affirmed 102 F. (2d) 428, and can only be exercised where there is a clear statutory ground. Section 5 furnishes no such authority as to the Quinaielt allotments. The Secretary was only authorized to issue trust patents containing a restraint on alienation with respect to Indians "located on" allotted lands "which may be advantageously utilized for agricultural or grazing purposes by the Indians." The Quinaielt allotments not being so limited either as to residence or the character of the land allotted, Section 5 has no application, and therefore the Secretary had no authority under that section to cause restraints on alienation to be inserted in the patents issued to the non-resident Quinaielt allottees. These Quinaielt allottees, under the special Act of 1911, were entitled to trust patents not containing any restraints, and for complete want of power in the Secretary, the issued patents of petitioners must be so construed.

This being true, Section 8 of the Act of June 25, 1910 (25 U. S. C. §406) is inapplicable because the Quinaielt trust patents do not contain a valid restraint on alienation, and therefore the Indians are free to contract for the sale of the timber thereon without the consent of the Secretary.

2. But if we assume that the Quinaielt patents under the special act of 1911 do contain a valid restraint on alienation and that Section 8 of the Act of June 25, 1910 (25 U. S. C. §406) is therefore applicable, the result is the same.

Before the Act of 1910, the Act of February 16, 1889 (25 Stat. 673; 25 U. S. C. §196; see also 25 U. S. C. §155) had given the President authority, under such regulations as he might prescribe, to authorize the Indians on reservations or allotments to sell *dead* timber, standing or fallen, on such reservations. *U. S. v. Algoma Lumber Co.*, 305 U. S. 415, 422.

In *U. S. v. Paine Lumber Co.* (1907) 206 U. S. 467, this Court held that a restraint on alienation respecting an Indian allotment did not prevent the Indians, even without the approval of the Secretary of the Interior, from lawfully selling live timber off their allotments, where the land was arable, and of no use as agricultural land until the timber was cut; that the restraint on alienation applicable to the land under the trust patents should not be exaggerated, and should not be applied to the timber under such circumstances.

In *Starr v. Campbell* (1908) 208 U. S. 507, however, it was held, distinguishing the case just cited, that where the allotted land was valuable primarily as timber land, and of little value for any other purpose, the restraint on alienation extends to the timber as well as the land; and also that the President could control the distribution of the proceeds of the timber sale for the benefit of the Indian.

As a consequence, at least in part, of this later decision, Congress passed the Act of 1910, a comprehensive act dealing with Indian problems; and in Sections 7 and 8 (36 Stat. 855, 857; 25 U. S. C. §§406, 407), Congress carefully covered the sale of living timber on both *allotted* and *unallotted* Indian lands in

two separate and distinct sections. As to *unallotted* lands it provided in Section 7 that the mature living, dead and down timber "may be sold *under regulations* to be prescribed by the Secretary of the Interior, and the *proceeds* of such sales shall be used for the benefit of the Indians of the reservation in such manner as he shall see fit." And as to *allotted* lands, such as involved in this case, Congress provided in Section 8 that the timber "may be sold by the *allottee* with the *consent* of the Secretary of the Interior, and the *proceeds* thereof shall be paid to the allottee or disposed of for his benefit under *regulations* to be prescribed by the Secretary of the Interior." In both sections Congress carefully embraced (1) the right to sell the timber and (2) the disposition of the proceeds for the benefit of the Indians, thus covering both questions raised in *Starr v. Campbell*, removing the restriction of that decision on the allottee's right to sell timber, and requiring only the Secretary's consent, but protecting the Indian fully as to the use and expenditure of the proceeds.

The right to sell was given by Congress to the "allottee." The "allottee" is the Indian to whom an "allotment" is made, and not his heirs (*Parkinson v. Skelton*, 33 Okla. 813, 128 Pac. 131, 132; *Lynch v. Franklin*, 37 Okla. 60, 130 Pac. 599, 600, affirmed 233 U. S. 269). Whatever the Secretary or the Ninth Circuit Court of Appeals may think of the desirability of protecting the heirs and descendants of the allottee through the experimental technique of selective logging, the fact remains that Congress conferred the

right to sell the timber on the *allottee* himself. The allottee's power of sale so conferred by Congress includes the right to fix the terms and conditions of sale. The Secretary has the right to approve or reject the conditions of sale arrived at between the allottee and the other contracting party, but he can make "regulations," in the case of *allotted* lands, only as to the *proceeds* of the sale. Here he has attempted, in the case of timber on allotted lands, also to make "regulations" as to the terms of sale—a power not conferred by Congress, and by necessary implication denied. *Expressio unius est exclusio alterius. U. S. v. Arredonda,* 6 Pet. 691, 725; *Botany Worsted Mills v. U. S.,* 278 U. S. 282, 289. In the case of timber on allotted lands, in the light of the history of Indian timber sales, Congress intended the Secretary to have a veto power, no more, and to have control of the distribution of the proceeds of the sale to the Indian for the latter's own good.

The argument (Resp. Br. p. 10) that the departmental construction for thirty years has considered that there is no difference in the Secretary's power as respects allotted and unallotted reservation lands, in the face of a clear and explicit statute admitting of no construction, can have no weight. Such administrative construction can be taken into account only when the statutes are open to doubt, not where they are clear as here. *U. S. v. Missouri Pac. R. Co.,* 278 U. S. 269, 280; *Burnet v. Chicago Portrait Co.,* 285 U. S. 1.

And in no event is the court bound by an administrative construction. *U. S. v. Missouri Pac. R. Co.,*

278 U. S. 269, 280; *Burnet v. Chicago Portrait Co*, 285 U. S. 1.

Moreover, as respects the so-called selective logging regulations generally, respondents admit (Resp. Br. p. 5) that before 1936 these regulations were not enforced, and hence their lawful application has only recently become justiciable, and hence any administrative construction with respect to them can bind nobody. It is not characteristic of administrative officials to construe their powers narrowly, but it is the function of the courts to protect the individual, especially the Indian, whose affairs are directly administered by Government officials, from excesses of administrative zeal, and this Court has often done so.

Respondents suggest (Resp. Br. p. 10) that the decision of the court below is not in conflict with *U. S. v. Algoma Lumber Co.*, 305 U. S. 415. It seems to us that counsel avoid our point under that case. In that decision the court specifically held that the contracts for the sale of timber on allotted Indian lands were contracts between the *Indian allottee* and the other contracting party, and that the Government was not a party to these contracts. This court said, 305 U. S. 415, 422, 423:

> "The contracts authorized were to be those of the Indians and not of the United States.
>
> * * * * * * *
>
> "As the Court of Claims found that the contracts for the sale of timber on allotted lands were entered into *by individual allottees as prescribed by §8 of the Act of 1910*, they stand on no different footing, as obligations of the United

States, from the tribal contract or similar contracts entered into under the Act of 1889. (Italics ours)

"Since none of the contracts in suit were contracts or obligations of the United States * * *."

This point was squarely before the court and was expressly decided. Now if, as held in that case, the contract for the sale of timber is that of the Indian allottee and not of the United States, then the Indian allottee has the right to fix the terms and conditions of sale, because Congress gave the power of sale to him and not to the Secretary. The Secretary is merely given, by Congress, a veto power over the contract, to be sure that the Indian realizes an adequate return from the contract, and the right to disburse the proceeds to the Indian allottee in his discretion. It was never the intent of Congress that the Secretary should withhold his consent unreasonably and nullify the allottee's right to sell timber.

We also respectfully submit that counsel gloss over our next very important point under *U. S. v. Shoshone Tribe*, 304 U. S. 111, 116-17, and *Chippewa Indians v. U. S.*, 301 U. S. 358, 375-6. The first case holds, as do many other decisions of this court, that the Indians are the substantial owners of the reservation lands and the timber thereon, and not the United States, even though the latter holds the naked legal title in trust; and the second case holds that the power of the Government to manage Indian lands "is subject to constitutional limitations and does not enable the Government * * * to deal with them as its own."

The Government can undoubtedly, as to its *own*

timber lands, put into effect so-called selective cutting regulations withholding 25% to 60% of the timber from sale; but to attempt to impose such regulations on timber belonging to the Indians raises serious questions of constitutional right under the Fifth Amendment and nullifies the power of sale conferred on the allottee by Congress.

Moreover, we again point to certain of the regulations of the Secretary here under attack (R. 360-361, 403), setting forth their purposes:

> "The preservation of the forest for scenic purposes along public highways, in the vicinity of Indian or white communities, and wherever the recreational or aesthetic value of the forest seems to exceed its value for the production of forest products."
>
> "* * * A strip not exceeding 300 feet in width on each side of streams, roads and trails, and in the vicinity of camping places and recreation grounds may be reserved, in which little or no cutting will be allowed * * *."

We say that these regulations violate the Quinaielt Treaty as to just compensation, and the Fifth Amendment, and that they cannot be justified on any basis. The Government can doubtless pursue such a policy with reference to its own lands, but it cannot do so with regard to the land of others without paying just compensation. If the Government desires to pursue such a policy on the Quinaielt Reservation for aesthetic, recreational and conservational purposes there is nothing to prevent the Government from doing so by making the necessary payment to the Indians, but without paying such compensation as provided by the

Treaty and the Fifth Amendment it can no more enforce such a confiscatory regulation than it could deny to any member of this Court, without paying just compensation, the right to cut his own timber along roads and streams on his private property because in the opinion of the Secretary "the recreational or aesthetic value of the forest seems to exceed its value for the production of forest products."

The regulations under attack amount to the Government's treating the Indian lands as belonging to the Government instead of to the Indians. Such a confiscatory policy cannot be constitutionally enforced on private persons, including Indians, without the payment of just compensation. Otherwise, we respectfully submit, the Quinaielt Treaty and the Fifth Amendment have become meaningless. If, as suggested by the respondents and the court below, the court on this point is "not at liberty to substitute its judgment for that of the Secretary" on a matter of *law* arising under a Treaty and the Constitution, then the judicial protection of Treaty and constitutional rights, and government by law instead of by men, have disappeared.

We cannot accept the view that the Secretary is the final arbiter of Treaty and constitutional rights without an earnest appeal to this Court for review and relief from the doctrine that the Secretary's views of aesthetic, recreational and conservational values justify the confiscation of private property without compensation.

We sincerely believe that the officials of the Department of the Interior would be the first to invoke

the Constitution and all the precedents of this Court if such doctrine were applied to them, and any timber lands privately held by them.

We respectfully submit that the regulations withholding from sale vast areas along roads, trails and streams, and camping grounds and recreation grounds, for aesthetic, scenic and recreational purposes, amounts to an appropriation by the Federal Government of Indian property for public use, without providing for the payment of just compensation, in violation of the Treaty and the Fifth Amendment; and that these regulations are, therefore, invalid. We feel certain that Congress never conferred on the Secretary the power to make such confiscatory and illegal regulations.

3. The Act of February 14, 1920 (41 Stat. 415; 25 U. S. C. §413), as amended in 1933 (47 Stat. 1417), provides that the Secretary of the Interior is authorized in his discretion, under such "rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue." Under this statute respondents seek to sustain the regulation authorizing a deduction of 8% from the gross proceeds of timber sales, to cover the cost of advertising and supervising the sales.

Our point is that this is a general Act and is not to be construed as abrogating a prior specific treaty in which the Government agreed to pay the expenses of Government employees. *Rogers v. U. S.*, 185 U. S. 83,

87-8; *U. S. v. Nix*, 189 U. S. 199, 205; *Washington v. Miller*, 235 U. S. 422, 427-8; *Baltimore National Bank v. Tax Commission*, 297 U. S. 209, 215. We could freely admit that a narrow construction of the treaty right in the Quinaielt Treaty of 1855 might support the view of the respondents and of the court below, but we suggest that that liberal construction in favor of the Indians, "the enlarged rules of construction" applied "in the sense in which they would naturally be understood by the Indians," which this Court has always said must be adopted in interpreting Indian treaties, supports the result for which we contend as to these Quinaielt Indians. *U. S. v. Payne*, 264 U. S. 446.

In *U. S. v. Payne*, 264 U. S. 446, this Court, speaking of the Quinaielts, said (p. 448):

> "These Indians yielded whatever claims they may have had to a valuable and extensive area in exchange for a relatively small reservation * * *. They are an unlettered people, unskilled in the use of language * * *. Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do, *Hauenstein v. Lynham*, 100 U. S. 483, 487, we conclude that the character of the lands thereafter to be set apart for them severally was not restricted."

In *Halbert v. U. S.*, 283 U. S. 753, 760, again speaking of the Quinaielt Indians, this Court said:

> "As a rule the Indians are poor and would be without means of supporting themselves while attempting to clear the land."

In the light of these considerations it seems to us that the special treaty should be construed as exempt-

ing the Quinaielt Indians from paying a fee to the Government for supervision of their timber lands by Government employees, and that the Act of February 14, 1920, as amended in 1933, being general, should not be construed to override the specific treaty, but to leave it in full force and effect.

Otherwise, the Government is in the uneviable position, after having taken from these Indians "a valuable and extensive area in exchange for a relatively small reservation," which was reserved to them "under their original title" of taking also a substantial percentage of the sale price of the Indians' property for supervision by Government officials—a taking of private property to which the Indians have not given their consent. It in fact amounts to a destruction or recapture of a part of the consideration originally given by the Government in the treaty in exchange for the cession by the Indians of their large and valuable rights and is in that sense a breach of the treaty —a result at all cost to be avoided if possible. It must be borne in mind that the regulations taking a part of the sale price of the Indians' property are made without the consent of the Indians, and in diminution of the vested rights conferred by the treaty, which are protected by the due process and just compensation clauses of the Fifth Amendment of the Federal Constitution. We think in this case the specific treaty, as against the general statute, can be construed to avoid this result, and respectfully urge this result be avoided.

CONCLUSION

The sole problem before this Court at this time is whether review should be granted of this cause.

We respectfully point out the fact that the propriety of these important regulations concerning the logging of Indian lands is for the first time presented to this Court; that the decision below affects the rights of thousands of Indians holding allotted timber lands; that many thousands of dollars worth of Indian timber is affected; that important treaty, constitutional and statutory rights of Indians are involved; that the true effect of very recent decisions of this Court requires consideration; and that the will of Congress, plainly expressed, concerning wards of the Government, is called into question.

In *U. S. v. Algoma Lumber Company*, 305 U. S. 415, 418, this Court granted certiorari, "the questions involved being of public importance in the administration by the United States of Indian lands * * *."

We respectfully submit that this is likewise such a case, and earnestly pray that the petition for certiorari may be granted.

Respectfully submitted,

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